

The Ninth Circuit—Most Maligned Circuit in the Country—Fact or Fiction?

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The Honorable Jerome Farris argues that the reason the Supreme Court overturns such a high percentage of Ninth Circuit cases accepted for review is not because the Circuit is "too liberal." Rather, Judge Farris emphasizes the high volume of cases heard by the Ninth Circuit and its willingness to take on controversial issues. He suggests that any objective observer would conclude that the Ninth Circuit is functioning well and that the system is working precisely as the Framers of the United States Constitution intended.

The shell game has survived over the centuries because there are always those who are not merely willing, but delighted, to be deceived. If the game is played often enough and mindlessly enough, one can come very close to fooling "all of the people all of the time."

The Ninth Circuit—most maligned circuit in the country—fact or fiction? It is absolutely true that the United States Supreme Court accepted twenty-nine cases from the Ninth Circuit for review in 1997 and reversed twenty-eight of those decisions, affirming only one. The prior year, the Supreme Court reviewed twelve Ninth Circuit cases and reversed ten. In 1995, the Supreme Court reviewed fourteen Ninth Circuit decisions and reversed ten. During that period, no other circuit had so many decisions reversed or so high a percentage of reversals of cases accepted for review.¹

According to these statistics, the Supreme Court reversed ninety-six percent of the Ninth Circuit cases it reviewed in 1997, an all time high.²

In the year ending March 31, 1997, the Ninth Circuit decided 8701 matters. In the same period ending in 1996, the Ninth Circuit decided 7813 matters. In 1995, the Ninth Circuit decided 7955 matters. If one considers the number of Ninth Circuit decisions reversed by the Supreme Court against the total number of cases decided by the Ninth Circuit, an entirely different picture emerges. Under this analysis, the Supreme Court let stand as final 99.7 percent of the Ninth Circuit's 1996 cases. No circuit in history has decided so many cases, and no circuit in history has had so low a percentage of cases reversed.

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¹ The Supreme Court decided a total of ninety-one cases in the 1996 term, reversing sixty-five, affirming twenty-three, and otherwise disposing of three. See Thomas C. Goldstein, *Statistics for the Supreme Court's October Term 1996*, 66 U.S.L.W. 3068 (U.S. July 15, 1997).

² All other circuits outside of the Ninth Circuit suffered a combined reversal rate of sixty-one percent. See Bill Kusliak, *Reversal Rate Keeps Getting Uglier*, San Francisco Recorder, July 2, 1997, at 1.

The point is not that one statistic is right and that the other statistic is wrong, but that statistics can be deceiving and can be used to paint almost any picture one wants. Courts issue "opinions"; they do not decide right and wrong in an absolute sense. Courts cannot determine right and wrong in an absolute sense because the law is not absolute. Deciding a legal rule is not like figuring out an immutable law of physics—a court always strives for "the right answer," but because the law has a life of its own, time determines what is correct. Courts on occasion reverse themselves for just that reason.

Any Ninth Circuit judge worthy of the title would want to revisit the decisions that were taken for review to determine whether in any single instance Supreme Court precedent was ignored. One cannot expect newspaper reporters to make that kind of review. News articles report the facts and others analyze the facts. It is my view that no responsible "expert" would comment before making such a review. What the review would reveal is no mystery because all decisions are in the domain of the public.

In 1997, the Supreme Court unanimously reversed twenty-one cases (eight of those decisions were per curiam). In the one Ninth Circuit case that the Supreme Court affirmed (the vote was eight to one), the majority held that the opinion properly followed Supreme Court precedent.³ In one case that the Supreme Court unanimously reversed, the Ninth Circuit followed a Tenth Circuit decision. The Eighth Circuit, however, decided the issue a different way and the Supreme Court resolved the split.⁴

In *Saratoga Fishing Co. v. J.M. Martinac & Co.*,⁵ a six to three reversal, Justice Scalia, joined by Justice Thomas, noted in dissent that "an impressive line of lower court decisions applying both federal and state law"⁶ has, like the Ninth Circuit, precluded liability in analogous situations.⁷

³ See *Babbitt v. Youpee*, 117 S. Ct. 727, 732 (1997). In *Babbitt*, the Supreme Court affirmed the Ninth Circuit's holding that a provision of the Indian Land Consolidation Act worked an unconstitutional taking by requiring escheat to the tribe of certain fractional interests in allotment upon the owner's death. See *id.*

⁴ See *California Div. of Labor Standards Enforcement v. Dillingham Constr.*, 117 S. Ct. 832 (1997). The Ninth Circuit held that a California prevailing wage law governing wages of apprentices was preempted by ERISA. See *Dillingham Constr. v. County of Sonoma*, 57 F.3d 712, 722 (9th Cir. 1995). In reversing, the Supreme Court found that the law at issue neither referred to nor was connected with ERISA. See *Dillingham Constr.*, 117 S. Ct. at 834. Thus, the Court held that the law did not "relate to" an ERISA plan for purposes of preemption. See *id.*

⁵ 117 S. Ct. 1783 (1997).

⁶ *Saratoga Fishing*, 117 S. Ct. at 1791.

⁷ The Ninth Circuit decision employed the *East River* doctrine, see *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 870 (1986), to preclude liability for property damage sustained on a vessel. See *Saratoga Fishing Co. v. Marco Seattle, Inc.*, 69

In eight of the reversed Ninth Circuit cases, the Supreme Court resolved conflicts between the circuits: *Old Chief v. United States*;⁸ *California Division of Labor Standards Enforcement v. Dillingham Construction*;⁹ *United States v. Brockamp*;¹⁰ *Regents of the University of California v. Doe*;¹¹ *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka, & Santa Fe Railway*;¹² *United States v. Hyde*;¹³ *Glickman v. Wileman Bros. & Elliot*;¹⁴ *Quality King Distributors, Inc.*

F.3d 1432, 1446 (9th Cir. 1995). The Ninth Circuit found that equipment added to a vessel after purchase was part of the "product itself." *See id.* In reversing, the Supreme Court concluded that the after-acquired equipment constituted "other property," and was not a part of the "product itself." *See Saratoga Fishing*, 117 S. Ct. at 1784.

⁸ 117 S. Ct. 644 (1997). In *United States v. Old Chief*, the Ninth Circuit found that, despite a defendant's offer to stipulate, the government was entitled to present evidence of a prior felony to prove the current charge of felon in possession of a firearm. *See* No. 94-30277, 1995 WL 325745 (9th Cir. Apr. 14, 1995) (basing the decision on 18 U.S.C. § 922 (g)(1)). The Supreme Court disagreed, finding that the rejection of a defendant's offer to stipulate to a felony conviction constituted an abuse of discretion where the name or nature of the underlying conviction raised the risk of tainting the jury's verdict. *See Old Chief*, 117 S. Ct. at 645.

⁹ 117 S. Ct. 832 (1997). *See supra* note 4 and accompanying text.

¹⁰ 117 S. Ct. 849 (1997). In *Brockamp*, the Supreme Court reversed the Ninth Circuit holding which allowed equitable tolling of the statutory limitations period for tax refund claims. The Supreme Court concluded that the strong language of the statute precluded the Ninth Circuit's application of the presumption favoring equitable tolling. *See id.* at 851.

¹¹ 117 S. Ct. 900 (1997). In *Doe v. Lawrence Livermore National Laboratory*, 65 F.3d 771, 776 (9th Cir. 1995), the Ninth Circuit held that the University of California's right to indemnification from the federal government divested the university of Eleventh Amendment immunity. The Supreme Court reversed, holding that a state entity's potential legal liability, rather than financial responsibility for judgments, triggered the application of the Eleventh Amendment. *See Regents of the Univ. of Cal.*, 117 S. Ct. at 904.

¹² 117 S. Ct. 1513 (1997). In this action, the Supreme Court held that an ERISA provision prohibiting interference with protected rights applied to welfare plans. *See id.* at 1515. The Ninth Circuit found that the provision applied only to interference with the attainment of rights capable of vesting. *See Inter-Modal Rail Employees Ass'n v. Atchison, Topeka, & Santa Fe Ry. Co.*, 80 F.3d 348, 351 (9th Cir. 1996).

¹³ 117 S. Ct. 1630 (1997). In *Hyde*, a criminal defendant attempted to withdraw his guilty plea after the plea was accepted, but prior to acceptance of the plea agreement. The Ninth Circuit reversed the district court's refusal to allow withdrawal without a showing by defendant of a "fair and just reason." *See Hyde v. United States*, 92 F.3d 779, 781 (9th Cir. 1996). The Supreme Court held that a showing of "fair and just reason" by defendant was necessary. *See Hyde*, 117 S. Ct. at 1631.

¹⁴ 117 S. Ct. 2130 (1997). In *Glickman*, the Court reversed the Ninth Circuit determination that mandatory assessments on growers, handlers, and processors of California tree fruits to pay for generic advertising violated the First Amendment. *See id.* at 2142. The Supreme Court rejected the use of a heightened First Amendment scrutiny and the Ninth

*v. L'anza Research International, Inc.*¹⁵ Thus, in many of the cases that were reversed, the Ninth Circuit was not alone in concluding a different result than the result the Supreme Court reached. Make no mistake, however, the Supreme Court *did* criticize the Ninth Circuit in some of its reversals. In one reversal, the Supreme Court stated that the Ninth Circuit failed to follow Supreme Court precedent.¹⁶

Courts are bound to follow Supreme Court precedent. However, what we write are opinions. The sin is not being wrong, but being wrong when the guidance was clear and when there was a deliberate failure to follow the guidance.

Two cases illustrate the dilemma of circuit courts: *Washington v. Glucksberg*,¹⁷ regarding physician-assisted suicide, and *Printz v. United States*,¹⁸ regarding the Brady Handgun Violence Prevention Act.¹⁹ The Supreme Court reversed both of these Ninth Circuit decisions.

The Brady Act was widely discussed publicly and received much political interest. At issue in *Printz v. United States* was whether the Brady Handgun Act violated Article I, § 8 and the Tenth Amendment of the United States Constitution by commanding chief law enforcement officers to conduct background checks of handgun purchasers. In a two to one decision, the Ninth Circuit found no constitutional violation. The Supreme Court, by a vote of five to four, reversed. Justice Scalia delivered the opinion of the Court in which Rehnquist, O'Connor, Kennedy, and Thomas joined; O'Connor filed a concurring opinion; Thomas filed a concurring opinion; Stevens filed a dissenting opinion, in which Souter, Ginsburg, and Breyer joined; Souter filed a separate dissenting opinion; and Breyer filed a dissenting opinion, in which Stevens joined. One might reasonably conclude that the solution was less than obvious.

Physician-assisted suicide has also been soundly debated in both public and political arenas. The question for decision in *Glucksberg* was whether a Washington statute that imposes a criminal penalty on anyone who "aids another person to attempt suicide" denies the Fourteenth Amendment's Due Process Clause liberty interest of mentally competent, terminally ill adults to choose their time and manner of death. The Ninth Circuit, in an eight to three en banc panel decision, found a liberty interest in the right to die and then

Circuit's finding that the law compelled financial support of others' speech. *See id.* at 2138-39.

¹⁵ 117 S. Ct. 2406 (1997) (mem.).

¹⁶ *See* *Suitum v. Tahoe Reg'l Planning Agency*, 117 S. Ct. 1659, 1665 (1997).

¹⁷ 117 S. Ct. 2258 (1997).

¹⁸ 117 S. Ct. 2365 (1997).

¹⁹ 18 U.S.C. § 922 (1994).

weighed the individual's compelling liberty interest against the state's interest. The Ninth Circuit found the statute unconstitutional. The Supreme Court unanimously reversed the Ninth Circuit decision with five separate concurring opinions.

Was the Ninth Circuit "wrong" in either of these cases? The Circuit would have been, in my opinion, if it had not resolved each of the complex issues and given them full, careful, and decisive consideration. The Supreme Court reversed these decisions, but who would say that the system is not functioning as it was intended to function? Everyone is entitled to their own views, but the conclusion, in my view, is that the system envisioned by the Framers of the Constitution continues to function properly.

The decisions of the Supreme Court become the law of the land because our system of government requires settled law. It is therefore necessary that one court make a final decision, and, right or wrong, that decision governs our society.

That the Supreme Court can be "wrong" is evident to any student of American law, history, politics, or society. This country's jurisprudential history is filled with famous cases, affecting our entire society, in which the Supreme Court decided that it had previously reached an erroneous result: *Brown v. Board of Education of Topeka*;²⁰ *Bunting v. Oregon*;²¹ *Garcia v. San Antonio Metropolitan Transit Authority*;²² and twice reversing itself on death penalty cases in the 1970s, to name a few.

The Supreme Court also reverses itself in many less well-known cases. This term it reversed a decision regarding public school teachers in parochial schools.²³ The term before that it reversed itself in *Seminole Tribe of Florida v. Florida*,²⁴ and the year before that in *Hubbard v. United States*.²⁵ Justice Brandeis's dissent in the 1932 case, *Burnet v. Coronado Oil & Gas Co.*,²⁶ argued that the Supreme Court should overrule an earlier decision²⁷ and cites

²⁰ 347 U.S. 483 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

²¹ 243 U.S. 426 (1917) (overruling *Lochner v. New York*, 198 U.S. 45 (1905)).

²² 469 U.S. 528 (1985) (overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976)).

²³ See *Agostini v. Felton*, 117 S. Ct. 1997 (1997) (overruling *Aguilar v. Felton*, 473 U.S. 402 (1985), and *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985) (overruled as to the portion addressing the "Shared Time" Program).

²⁴ 116 S. Ct. 1114 (1996) (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)).

²⁵ 514 U.S. 695 (1995) (overruling *United States v. Branblett*, 348 U.S. 503 (1955)).

²⁶ 285 U.S. 393 (1932), overruled by *Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938).

²⁷ See *Gillespie v. Okla.*, 257 U.S. 501 (1922), overruled by *Helvering*, 303 U.S. at 376.

thirty-five cases in which the Supreme Court overruled or qualified its earlier decisions.

This list of Supreme Court reversals—in no way meant to be comprehensive—actually constitutes a high reversal rate considering that the Supreme Court currently averages about eighty to ninety decisions a year, or one percent of the number of cases that the Ninth Circuit hears. This comparison suggests that the Supreme Court would have to reverse one hundred Ninth Circuit cases a year in order to reverse the Ninth Circuit at as high a rate as the Supreme Court reverses itself (which it does about once a year).

In other instances, Congress has decided that the Supreme Court had the wrong answer and enacted legislation to effectively overrule the decision, such as the Religious Freedom Restoration Act of 1993 (RFRA)²⁸ and the 1982 Voting Rights Act Amendments.²⁹ The Supreme Court upheld the constitutionality of the 1982 Voting Rights Act Amendments³⁰ and it found RFRA unconstitutional.³¹

Do these results prove that Congress was right and that the Supreme Court was wrong? Or do these results prove that the Supreme Court was right and that Congress was wrong? Of course not. Rather, the results provide examples of the checks and balances designed in the Constitution to make our government run properly. Similarly, when the Supreme Court reverses an appellate court decision, it does not mean that the decision was wrong in an absolute sense, and more importantly, it does not mean that the appellate court was not functioning properly in its role in the judiciary and in the United States government.

Part of the cause of the misperception about right and wrong is created in the training of lawyers at law school. Most law schools begin teaching law in a formalistic manner: the student learns the law, and there is only one correct law. This formalism gets carried on as law students enter the legal profession. Lawyers often argue before me that there is only one possible result ("The law dictates this result!"). This is rarely true, and is never true in complicated cases. There are always some arguments for each side, otherwise the case would be frivolous. The bottom line is that reasonable minds can differ and can each still be reasonable.

The Ninth Circuit deals with more cases than any other circuit. It is not surprising, then, that the Ninth Circuit would deal with more complicated and important issues than any other circuit. Both of these factors contribute to the

²⁸ 42 U.S.C. § 2000bb (1994).

²⁹ 42 U.S.C. § 1973b (1994).

³⁰ See *Reno v. Bossier Parish School Bd.*, 117 S. Ct. 1491 (1997).

³¹ See *Boerne v. Flores*, 117 S. Ct. 2157 (1997).

Supreme Court's review and reversal of more Ninth Circuit cases than cases from other circuits.

Some observers contend that the Ninth Circuit is reversed so often because it is the most liberal circuit in the country and because the Supreme Court is currently conservative. This hypothesis also provides ammunition to those now arguing that the Ninth Circuit should be split (a topic for another article).³² However, these observers have failed to review the facts. Of the opinions signed by Ninth Circuit judges that were reversed this year by the Supreme Court, eleven were authored by Democratic presidential appointees, and nine were authored by Republican presidential appointees. Apparently the Supreme Court is an equal opportunity reverser.

To function properly, each court must do its duty to the best of its ability. Parties must be able to rely on the full resolution of cutting edge issues in each court to which the issues are submitted. There is always the risk of reversal, but that risk should not—cannot—drive the system. The Supreme Court was better able to treat the question of physician-assisted suicide and the issue of the Brady Act because it had decisive opinions to review. One could assume that these issues are closed, and they certainly may be for the immediate future. History reminds us, though, that serious controversial issues are revisited from time to time. This comment is written by a circuit judge whose life would certainly have been different had the *Dred Scott*³³ decision not been revisited.

I make no prediction for the future of any of the Ninth Circuit reversals, but one commentator was not so cautious. Writing while *Glucksberg*³⁴ was pending before the Supreme Court, Roger S. Magnusson³⁵ in the *Pacific Rim Law and Policy Journal*, predicted:

Although an adverse Supreme Court opinion could potentially retard the process of pro-euthanasia law reform, this would be a temporary delay only which could not survive generational change. In the United States and beyond, the development of a legal right to die with medical assistance, appears inevitable.³⁶

³² This argument, like most of the arguments for splitting the circuit, has never made sense to me. Accepting, *arguendo*, the hypothesis that the Ninth Circuit is reversed often because it is "too" liberal or "too" often wrong, a split will still leave at least one, and perhaps two, circuits that are too liberal or too often wrong.

³³ *Dred Scott v. Sandford*, 60 U.S. 393 (1856) (superseded by the adoption of the 13th and 14th Amendments of the U.S. Constitution after the Civil War).

³⁴ 117 S. Ct. 2258 (1997).

³⁵ Lecturer, University of Sydney School of Law; B.A., LL.B. (Hons) (A.N.U.) (1988), Ph.D. (Melb.) (1994).

³⁶ Roger S. Magnusson, *The Sanctity of Life and the Right to Die: Social and*

What is important to remember is that opinions, unlike arithmetic solutions, may vary. Our system under the Constitution is designed to put an end to variations because the Supreme Court makes the final decision. The danger is not that an appellate court gets reversed, but that a court might let possible reversal deter decisive, full, and reasoned consideration of important issues. An even greater danger is that the high regard in which all courts must be held if our system is to be a rule of law, not of judges, is threatened if those who are personally ambitious can dismiss a reasoned decision of any court with the throwaway phrase—"oh well, that decision is just the irresponsible act of a coterie of liberal judges." All tyrants first seek to malign the rule of law.